



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 08302972

DATE: APR. 17, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, a rehabilitation facility, seeks to employ the Beneficiary as rehabilitation service manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage from the priority date onward.

On appeal the Petitioner submits a statement together with copies of previously submitted documentation, and asserts that the evidence establishes its ability to pay the proffered wage.

In visa petition proceedings it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date¹ of the petition onward. In this case the proffered wage is \$122,179 per year and the priority date is December 7, 2017.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

In this case the labor certification states that the Beneficiary began working for the Petitioner in August 2015 and the Petitioner submitted a statement in 2019 that the Beneficiary's salary is \$55,328. The Petitioner did not submit any of the Beneficiary's Forms W-2. The only evidence of wages paid to the Beneficiary is a single weekly pay statement from March 2019 from which no conclusions can be drawn about how much the Beneficiary was paid over the entire year of 2019, or any other year. Therefore, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of December 7, 2017, onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage that year.

¹ The "priority date" of a petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

The record includes a copy of the Petitioner's federal income tax return, Form 1120S, for 2017. If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation"). In this case, a figure of -\$78,069 is entered on page 1, line 21, and the same figure is entered on line 18 of Schedule K. Thus, the Petitioner had a net loss of \$78,069 in 2017. As for net current assets (or liabilities), they are determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18, respectively, of Schedule L. In this case the Petitioner's current assets were \$68,965 and its current liabilities were \$92,794 in 2017, resulting in net current liabilities of \$23,829, or net current assets of -\$23,829. Accordingly, the Petitioner had no net income nor any net current assets with which to pay the proffered wage in 2017.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner was incorporated in 2014, indicates that it began operations in 2015, and states that it had seven employees at the time the petition was filed in August 2018.² In its appeal statement the Petitioner asserts that the Beneficiary, as one of its current employees, has a salary of \$55,328 and the balance of his proffered wage will be covered from the \$108,000 salary of a vacant position previously occupied by a nurse practitioner. As previously discussed, however, the evidence in the record does not establish that the Beneficiary is receiving the alleged salary of \$55,328. The Petitioner has submitted no Forms W-2, Wage and Tax Statements, nor any other documentation showing the total wages paid to the Beneficiary in any year since his hiring in 2015. While a nurse practitioner is identified in some photos of the staff that were submitted with the petition, the Petitioner has submitted no personnel records or other documentation confirming that a nurse practitioner was actually employed, the hiring date and the salary of that individual, and the date that individual left the Petitioner's employ. Nor has the Petitioner established that no replacement for the nurse supervisor has been hired. Thus, the evidence does not support the Petitioner's claim that \$108,000 from a vacant

² The tax returns in the record show that the Petitioner had no income in 2015, followed by gross receipts of \$2,134,714 in 2016 and \$2,066,389 in 2017. Thus, the Petitioner has not been in business long enough to demonstrate a historical pattern of growth and had a slight decline in gross receipts from 2016 to 2017. There is no evidence about the Petitioner's reputation within the industry.

position has been available since the priority date in December 2017 to pay a portion of the Beneficiary's proffered wage.

The Petitioner reiterates on appeal a claim first made in its response to the Director's request for evidence (RFE) that it had additional resources with which to pay the proffered wage, including total assets of \$69,065 at the end of 2017, as recorded on its 2017 New York State franchise tax return [as well as on its 2017 federal income tax return], and \$41,409 in a business account with [REDACTED] Bank. The Petitioner's total assets are not indicative of its ability to pay the proffered wage, however, because they have not been balanced by the Petitioner's total liabilities. Thus, the Petitioner's total assets in 2017 cannot properly be considered in determining its ability to pay the proffered wage.³ As for the bank account, the record includes only one page of a five-page statement from [REDACTED] Bank, dated May 13, 2019, that does not identify the Petitioner as the account holder and, even if it did, provides no evidence of the Petitioner's continuing ability to pay the proffered wage as of the priority date in December 2017. Furthermore, while the regulation at 8 C.F.R. § 204.5(g)(2) allows for the submission of other evidence such as bank account records "in appropriate cases," bank account records are not among the three types of required evidence identified in the regulation – either annual reports, federal tax returns, or audited financial statements – to demonstrate a petitioner's ability to pay the proffered wage. Bank statements show an account balance on a given date, not the account holder's sustainable ability to pay a proffered wage over time. Moreover, the Petitioner has not shown that the money in its bank account constitutes a financial resource separate and apart from its current assets as recorded in Schedule L of its federal income tax returns.

Finally, while asserting its ability to pay the proffered wage of \$122,179 per year, the Petitioner affirms a previous statement in response to the RFE that it only intends to employ the Beneficiary 35 hours per week at the prevailing wage of \$58.74 per hour (for level 3 medical and health services managers in the Petitioner's geographical area), which will result in an annual salary of only \$106,806.80. This figure does not comport with the proffered wage as certified on the labor certification, which is \$122,179 per year. Box G.1. of the labor certification expressly states that the proffered wage is \$122,179 per year. Regardless of the precise number of full-time hours the Beneficiary may work on a weekly basis, the Petitioner must pay him the proffered wage of \$122,179 over the course of an entire year. For the reasons previously discussed, the Petitioner has not established its ability to pay that proffered wage.

In accord with the foregoing analysis, we conclude that the Petitioner has not established its continuing ability to pay the proffered wage of \$122,179 per year from the priority date of December 7, 2017, onward based on the totality of its circumstances.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward. The appeal will be dismissed for the above stated reason.

ORDER: The appeal is dismissed.

³ As previously calculated, the sub-category of current assets was less than the Petitioner's current liabilities in 2017.